

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VIRGIL E. SOUTH)	
Claimant)	
)	
VS.)	
)	
TRI STATE TANK CORPORATION)	
Respondent)	Docket No. 1,044,608
)	
AND)	
)	
ACE AMERICAN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the December 9, 2009 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on March 3, 2010.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Ryan Weltz of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered a complete tear of the quadriceps tendon as a result of a work-related accidental injury. The tear was surgically repaired. The parties were unable to agree on the percentage of permanent disability claimant suffered to his leg as a result of the accidental injury. The claimant's medical expert provided a 25 percent rating and the respondent's medical expert provided a 2 percent rating for the claimant's right leg.

The Administrative Law Judge (ALJ) determined the claimant's medical expert failed to properly utilize the *AMA Guides* to arrive at his rating. Consequently, the ALJ adopted the respondent's medical expert's rating. But the ALJ noted the respondent's medical

expert had used a table in the *AMA Guides* that was for upper extremities in order to modify his 7 percent rating to 2 percent. Accordingly, the ALJ concluded the only rating that was developed pursuant to the *AMA Guides* was the respondent's medical expert's 7 percent rating. The ALJ awarded claimant compensation for a 7 percent permanent partial scheduled disability to the right leg.

Claimant requests review of the nature and extent of claimant's disability. Claimant argues that his medical expert's rating is more persuasive and he should be awarded compensation based upon a 25 percent permanent partial scheduled disability to the right leg. Conversely, respondent argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's K.S.A. 44-510d scheduled disability to the right leg.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Mr. Virgil South began his employment with respondent as a detail man which was preparing trucks to go to customers. Respondent builds truck for fuels, propane, vacuum and cranes. Claimant received his CDL license so he could drive and deliver trucks to customers as well as attend trade shows.

On September 27, 2008, claimant was enroute to Boston, Massachusetts, to deliver a truck when he stopped in Kingdom City, Missouri, for fuel. He described his accident as follows:

We stopped in Kingdom City at the Petco to fuel up and we pulled into the fuel island and I got out and fueled the truck. And I crawled back in to pull it up so the other driver behind me could fill up while I went in and paid. The fuel island was just really terribly oiled with diesel fuel and when I stepped up on the steps to get into the truck my foot slipped and I had a big pop.¹

Claimant testified the pop occurred in his right knee and he had a big knot on the top of his right knee. Claimant notified respondent immediately and another driver was summoned to finish the route. Medical treatment was provided to claimant at a hospital's emergency room in Fulton, Missouri. X-rays were taken and claimant's knee was immobilized. The doctor then referred claimant to an orthopedic surgeon in Kansas City.

¹ R.H. Trans. at 7.

Dr. Jeffrey Salin performed surgery on claimant's right knee on October 7, 2008. The quadriceps tendon is located above the kneecap and attaches to the kneecap. The surgery to repair the tear required drilling holes through the patella and drawing wire sutures through the tendon and through the holes in the patella to reunite the two. The doctor repaired claimant's right quadriceps tendon and then referred him to physical therapy for two months. In March 2009 claimant was released by Dr. Salin to return to regular duty work. On May 9, 2009, claimant was involved in a vehicle accident wherein he hit both of his knees against the dash board. Respondent's company doctor treated the claimant for approximately six weeks and then released him to return to work. Claimant testified that he had increased pain temporarily in his right knee. His employment with respondent was terminated on July 3, 2009. Claimant has not worked anywhere since being released. At the time of the regular hearing he was drawing unemployment compensation.

Before the instant work-related accident claimant had arthroscopic surgery performed on his left knee in 1989 and then a left knee replacement was done in 1996. Claimant testified he did not have any problems such as getting in and out of trucks, bending, squatting and/or stooping with his right knee before the accident. He now has problems going up and down stairs, kneeling and squatting since the accident. Claimant also testified that when he stands or walks for any period of time his right knee will swell.

Dr. James S. Zarr, board certified in physical medicine and rehabilitation, examined and evaluated the claimant on August 17, 2009, at respondent's attorney's request. After reviewing the medical records, taking a history from the claimant, and performing the physical examination, the doctor diagnosed claimant as having mild persistent right knee pain, status post repair of quadriceps tendon rupture, preexisting osteoarthritis and status post left total knee replacement.

Based on the *AMA Guides*², Dr. Zarr assigned a 2 percent to the right lower extremity at the level of the right knee due to pain in the distribution of the femoral nerve. In the report generated by Dr. Zarr after claimant's examination, he provided a 7 percent lower extremity rating for pain in the distribution in the femoral nerve. Dr. Zarr then utilized another table in the *AMA Guides* to apply a 30 percent "grade" to the 7 percent rating, which resulted in a 2 percent rating for claimant's lower extremity. The doctor released claimant to full-time regular duty work without restrictions and opined that claimant would not require future medical treatment.

At the request of claimant's attorney, Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant on April 13, 2009. Dr. Prostic took a history from claimant and performed a physical examination. Claimant's right knee had

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

mild effusion and synovitis (active osteoarthritis) but there was no tenderness. X-rays were taken of claimant's right knee which revealed a neutral alignment of the knee with medial joint space narrowing and evidence of moderate patellofemoral arthritis. Dr. Prostic diagnosed the claimant with progressive osteoarthritis of his knee and opined claimant will eventually require a total knee replacement. The doctor opined that claimant's progressive osteoarthritis was aggravated or accelerated due to claimant's injury in September 2008.

Based upon the *AMA Guides*, Dr. Prostic opined claimant has a 25 percent permanent partial functional impairment to his right lower extremity. Dr. Prostic agreed that he did not totally utilize the *AMA Guides* to determine claimant's rating. Dr. Prostic explained:

Q. If I understood your direct testimony correctly, the 25-percent rating you gave was not entirely in accordance with the *AMA Guides*; is that correct?

A. The *AMA Guides* do not include ruptures of the patellar tendon or quadriceps tendon. So in rating that we have to go a bit outside of the *Guides*. The *Guides* also don't take into account the synovitis or effusion of the knee. So again we need to go a bit outside of the *Guides* in order to account for those.³

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.

Consequently, the Act requires the amount of the functional impairment be established by competent medical evidence and be based on the *AMA Guides*, if the impairment is contained in the *AMA Guides*.

Dr. Prostic testified that the *AMA Guides* do not contain a rating for a rupture of the quadriceps tendon nor for effusion of the knee, consequently, his rating was not entirely based upon the *AMA Guides*. Dr. Zarr rated the claimant's lower extremity based solely upon claimant's pain complaints.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁴ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability.

³ Prostic Depo. (Aug. 11, 2009) at 17.

⁴ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁵

The ALJ, in reviewing Dr. Prostic's rating, considered the *AMA Guides* and stated the *AMA Guides* contains an 18 page section devoted entirely to impairments of the lower extremity. This particular section of the *AMA Guides* was not identified by the parties nor was it made part of this record. The ALJ further adjusted Dr. Zarr's rating because the ALJ concluded the doctor had used an inappropriate table to reduce his rating. Although the doctor listed the table in his report, that section of the *AMA Guides* was not made a part of this record. In *McGrady*,⁶ the Board found that an administrative law judge would be justified in utilizing the *AMA Guides* conversion chart in determining the combined percentages of impairment suffered by a claimant. The Board, in *McGrady*, determined that the use of the *AMA Guides* conversion chart did not add evidence to the record, but simply provided a method for combining multiple ratings or converting ratings already in the record to a general body rating.

In this instance, the ALJ went further than in *McGrady*. Here, the ALJ sought out additional sections of the *AMA Guides* in interpreting and actually changing the determination by a physician as to what, if any, functional impairment claimant may have suffered. The Kansas Court of Appeals, in *Durham*,⁷ was asked to consider whether the claimant could cite the *AMA Guides* when those guidelines were never introduced into evidence and were not a part of the record on appeal. The claimant, in *Durham*, attached the Guidelines to his brief as an appendix. The Court, in *Durham*, ruled that:

An appellant has the burden to designate a record sufficient to establish the claimed error. Without an adequate record, an appellant's claim of alleged error fails.⁸

The Court went on to find that the assertions contained in the claimant's brief were not sufficient to satisfy the inadequacies in the record. As the record in *Durham* did not include the *AMA Guides*, the court determined that the record contained no support for the claimant's argument concerning the *AMA Guides*. The claimant's argument was, therefore, rejected. The fact-finder is always free to find an opinion more persuasive or credible than another. But the fact-finder should not go outside the record in doing so.

⁵ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁶ *McGrady v. Delphi Automotive Systems*, No. 199,358, 1998 WL 229871 (Kan. WCAB April 6, 1998).

⁷ *Durham v. Cessna Aircraft Co.*, 24 Kan. 334, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997).

⁸ *Id.* at 334-335; *citing McCubbin v. Walker*, 256 Kan. 276, 295, 886 P.2d 790 (1994).

In this instance, as in *Durham*, the sections of the *AMA Guides* utilized by the ALJ were not made a part of this record. The Board, therefore, finds consistent with *Durham*, that the utilization by the ALJ of the sections of the *AMA Guides* which were not made a part of the record was inappropriate. Therefore, the criticism of Dr. Prostic's as well as Dr. Zarr's functional impairment opinions by the ALJ is improper. Furthermore, neither the ALJ nor the Board members have a medical degree or formal training in the use of the *AMA Guides*. It is unacceptable for the fact-finder to make use of the *AMA Guides* in the manner utilized by the ALJ. Although the ALJ may use the *AMA Guides* for the purpose of determining a combined value,⁹ the fact-finder should rely on the opinion testimony of medical experts when it determines matters of diagnosis and treatment and the proper use of the *AMA Guides*. The Board, therefore, finds that the ALJ's rejection of Drs. Prostic and Zarr's ratings was inappropriate.

As previously noted, Dr. Prostic's uncontradicted testimony was that the *AMA Guides* do not contain a section for rating a quadriceps tendon tear. Dr. Zarr simply rated the claimant's lower extremity based upon pain. The ALJ discounted Dr. Prostic's rating as being an attempt to reach a desired goal of a high impairment rating, but the Board, based upon the record in this case, cannot so easily discount that testimony because there is nothing in the record to contradict his testimony that a rating for claimant's condition is not contained within the *AMA Guides*.

Arguably, Dr. Prostic's opinion is just as consistent with the tenets expressed in the *AMA Guides* as the opinion expressed by Dr. Zarr. However, to make an analysis of which doctor's opinion more accurately reflects the intentions of the *AMA Guides*, based upon the record in this case, the fact-finder would be required to go outside the record and independently interpret portions of the *AMA Guides*. Because a decision must be made based upon the evidence introduced before the ALJ, the Board concludes it should not go outside the record to interpret the *AMA Guides* in that manner. In this instance, the evidentiary record fails to persuade the Board that either rating is more credible. Consequently, the Board will accord equal weight to both opinions. Averaging the two opinions results in a 13.5 percent impairment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 9, 2009, is modified to reflect claimant has suffered a 13.5 percent scheduled disability to his right leg.

The claimant is entitled to 19.14 weeks of temporary total disability compensation at the rate of \$529 per week in the amount of \$10,125.06 followed by 24.42 weeks of permanent partial disability compensation, at the rate of \$529 per week, in the amount of

⁹ *McGrady, supra.*

\$12,918.18 for a 13.5 percent loss of use of the right leg, making a total award of \$23,043.24, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of March 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Ryan Wertz, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge